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No. 08-490

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In The

Supreme Court of the United States

MING DUNG, also known as MING DONG,

Petitioner,

v.

MICHAEL B. MUKASEY,
Attorney General of the United States,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether it is unlawful to return an alien to potential sterilization and torture simply because his or her fear of sterilization and torture arose more than 90 days after their prior removal proceedings had been adjudicated?

Whether 8 U.S.C. § 1229A is the sole procedure for pursuing an asylum application?

PARTIES TO THE PROCEEDING

Petitioner, MING DUNG, also known as MING DONG ("Mr. Dong"), was the Petitioner before the U.S. Court of Appeals for the Seventh Circuit. Mr. Dong was the Respondent before the Board of Immigration Appeals.

Respondent Michael Mukasey was the Respondent before the U.S. Court of Appeals for the Seventh Circuit.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Circuit Court for which this petition is filed is reported as *Huang et al. v. Mukasey*, 534 F.3d 618 (7th Cir. 2008).

JURISDICTION

The Circuit Court entered its decision and order on July 15, 2008. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

8 U.S.C. § 1158(a) provides, in pertinent part:

(1) In general

Any alien who is physically present in the United States or who arrives in the United

States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section. . . .

(2) Exceptions

. . .

(B) Time limit

Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

(C) Previous asylum applications

Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.

(D) Changed circumstances

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an

> application within the period specified in subparagraph (B).

8 U.S.C. § 1158(a).

8 U.S.C. § 1231(b)(3) prohibits the Attorney General from removing "an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."

8 U.S.C. § 1231 (note a) provides that: "It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture."

8 U.S.C. § 1229a(a)(7)(A) provides, in pertinent part, that "[a]n alien may file one motion to reopen proceedings under this section. . . ."

8 U.S.C. § 1229a(a)(7)(C)(i) mandates that "[e]xcept as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal."

8 U.S.C. § 1229a(a)(7)(C)(ii) indicates that there is "no time limit on the filing of a motion to reopen if the basis of the motion is to apply for [asylum or withholding of removal] and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and

would not have been discovered or presented at the previous proceeding."

STATEMENT OF THE CASE

This petition seeks to protect an alien's right to seek protection in the United States from removal to a country where he or she will face persecution and/or torture. This petition also seeks to ensure the U.S. government complies with its mandatory obligations under law that it does not return an alien to a country when there are substantial grounds to believe that he or she will be persecuted and/or tortured in that country.

A. Factual background and proceedings below

Petitioner Ming Dung a/k/a Ming Dong ("Mr. Dong") is a native and citizen of the People's Republic of China, born in Fuzhou City, Fujian Province on xxxxx xx, xxxx. App. ("App.") at 18. Mr. Dong entered the United States without proper entry documents on or about October 8, 1996 in New York, New York. App. at 18. Mr. Dong was stopped at the Border and placed into exclusion proceedings by the then-Immigration and Naturalization Service[1] pursuant to

[1] The Homeland Security Act of 2002 transferred the functions of the Immigration and Naturalization Service to the Department of Homeland Security ("DHS"). Pub.L. 107-296; 116

(Continued on following page)

the Immigration and Nationality Act, former §§ 212(a)(6)(C)(i), (a)(7)(A)(i)(I), (a)(7)(B)(i)(I), and (a)(7)(B)(i)(II) which was codified as 8 U.S.C. §§ 1182(a)(6)(C)(i), (a)(7)(A)(i)(I), (a)(7)(B)(i)(I), and (a)(7)(B)(i)(II). App. at 12-13.

1. Prior Proceedings

On December 14, 1999, Mr. Dong filed applications for asylum, withholding of removal under the INA, and relief under Article III of the Convention Against Torture. The basis of the application was that Mr. Dong's family had been persecuted on account of his parents violating China's coercive one-child family planning policy, resulting in extreme hardship to Mr. Dong and his family. In addition, Mr. Dong asserted that he had suffered persecution and had a fear of future persecution on account of his Christian religious beliefs.

On May 5, 2000, a hearing was held before Immigration Judge Craig M. Zerbe ("IJ" or "IJ Zerbe") on Mr. Dong's applications. App. at 12. At the conclusion of the hearing, IJ Zerbe issued an oral decision denying Mr. Dong's applications and ordering him deported from the United States. App. at 12.

Stat. 2135; 6 U.S.C. § 202(3). As of March 1, 2003, the INS ceased to exist, and its "services" functions were transferred to the Bureau of Citizenship and Immigration Services, while detention and removal functions were performed by the Bureau of Immigration and Customs Enforcement. (Hereinafter, collectively referred to as the "Service").

On June 5, 2000, Mr. Dong timely appealed the decision of the IJ to the Board of Immigration Appeals ("BIA" or "Board"). On June 17, 2002, the Board affirmed, without opinion, the decision of the Immigration Judge. App. at 12.

2. Facts and Proceedings that Give Rise to this Petition

On December 25, 2002, Mr. Dong married Rong Lin, also a native and citizen of China, in New York, New York. App. at 18. Together, Mr. Dong and his wife have two children; the first, a boy named E.V., was born on xxxxx xx, xxxxx in Barron, Wisconsin; the second, a girl named J.D. was born on xxxxx xx, xxxx in New York, New York. App. at 18. Consequently, Mr. Dong developed a fear of persecution on account of his violation of the Chinese one-child family planning policy.

On March 28, 2007, Mr. Dong filed a Motion to Reopen Based Upon Changed Country Conditions and a Motion to File a Successive Application for Asylum, Withholding of Removal, and Relief Under Article III of the Convention Against Torture Pursuant to INA § 208(A)(2)(D), 8 U.S.C. § 1158(a)(2)(D). App. at 18-48.

The application asserted that Mr. Dong was eligible to apply for asylum and related relief without having to file a motion to reopen his prior hearing. App. at 18-45. In the alternative, Mr. Dong asserted that country conditions have changed since his prior

asylum hearing such that reopening was warranted. App. at 45-48.

On May 26, 2006, the BIA denied Mr. Dong's Motion to File Successive Asylum, construing it as a Motion to Reopen, and based the denial on the numerical limitations applied to Motions to Reopen. App. at 12-16. Specifically, the Board rejected Mr. Dong's assertion that pursuant to 8 U.S.C. § 1158(a)(2)(D), an applicant need not file a motion to reopen. App. at 13. The Board relied upon 8 U.S.C. § 1229a(c)(7)(C) to assert that a motion to reopen was required. App. at 13-14. It further asserted that to rule otherwise would render 8 U.S.C. § 1229a(c)(7)(C) "superfluous." App. at 13-14. Thus, a motion to reopen would be time barred. App. at 14. Further, the Board concluded, relying upon *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007) and *Matter of J-W-S-*, 24 I&N Dec. 185 (BIA 2007), that Mr. Dong failed to demonstrate changed country conditions in China that would warrant reopening. App. at 14-15. Finally, the Board declined to exercise its *sua sponte* authority to reopen based upon family unity. App. at 16-17. Consequently, the Board denied the motion, and it is from that decision that Mr. Dong timely petitioned for review to the Seventh Circuit Court of Appeals.

B. Decision of the Seventh Circuit

On July 15, 2008, the U.S. Court of Appeals for the Seventh Circuit dismissed Mr. Dong's petition in part and denied it in part. *Huang et al. v. Mukasey*,

534 F.3d 618 (7th Cir. 2008). In relevant part, Judge Richard Posner, writing for the panel, found that Mr. Dong was not entitled to file, and have adjudicated, a successive asylum application based upon changed circumstances without having to reopen his prior asylum/removal proceedings. The Court stated simply that it "rejected the identical contention in *Cheng Chen v. Gonzales,* 498 F.3d 758 (7th Cir. 2007), and [Mr. Dong] has presented no reason to suggest that our decision should be reexamined." *Huang*, 534 F.3d at 623.

REASONS FOR GRANTING THE PETITION

This case presents an exceptionally important question of federal law dealing with the harmonization of several statutes: How should the time limitations on motions to reopen removal proceedings be harmonized with the non-discretionary duty of the U.S. to not return an alien to a country where he or she faces persecution or torture?

The Seventh Circuit relied whole cloth on its prior decision in *Cheng Chen v. Gonzales,* 498 F.3d 758 (7th Cir. 2007) where it afforded deference to the agency's reading of the statutes and regulations which required a motion to reopen notwithstanding other statutory language to the contrary. *See Cheng Chen*, 498 F.3d at 760 (citing *Chevron v. Natural Resources Defense Council,* 467 U.S. 837, 842-44 (1984)).

However, the Seventh Circuit's decision here, as in both *Chen,* and the Board's precedential decision in *Matter of C-W-L-*, 24 I&N 346 (BIA 2007) read the statutory and regulatory scheme in a manner that necessarily will result in circumstances where 8 U.S.C. § 1158(a)(2)(D) and 8 U.S.C. § 1231(b)(3) will be rendered meaningless. Said another way, the Court's decision here will result in the U.S. returning an individual to persecution or torture – in this case, Mr. Dong – simply because his or her fear of persecution arose more than 90 days after completion of their prior removal proceeding. This result is not permitted under the absolute language of 8 U.S.C. § 1231(b)(3) nor under 8 U.S.C. § 1158(a)(2)(D). As such, the Board's insertion of a motion to reopen requirement into the statute where no such requirement existed was erroneous as a matter of law, and is not entitled to any deference, let alone *Chevron* deference. Thus, this Court should grant this Petition and review the decision of the Seventh Circuit where it afforded deference to a fundamentally flawed reading of the statute by the Board below.

I. IT IS UNLAWFUL TO REMOVE MR. DONG TO POTENTIAL STERILIZATION AND TORTURE EVEN THOUGH HIS FEAR OF STERILIZATION AND TORTURE AROSE MORE THAN 90 DAYS AFTER THEIR PRIOR REMOVAL PROCEEDINGS HAD BEEN ADJUDICATED

The Attorney General is prohibited from removing "an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3); *see also* 8 U.S.C. § 1231 (note a) ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture."). The Seventh Circuit here did not address this argument, which was presented below. Instead, the Court merely referenced its prior decision where it afforded deference to the Board's decision which required a motion to reopen, notwithstanding the statutory language to the contrary.

Any claim of authority to apply discretion, or time limits, to determinations under withholding of removal is a clear violation of law. As Doris Meissner, the then-Commissioner of Immigration and Naturalization Service explained in the Federal Register, "Form I-589 is an application for both asylum and withholding of removal. *There is no 1-year time limit*

for filing for withholding of removal, so an application that is untimely as to asylum may nevertheless be adjudicated for withholding of removal." 63 FR 13875-02 (Mar. 23, 1998) (emphasis added). Thus, even assuming that the statute and regulations do not permit successive untimely applications for asylum (although they do), the denial of the right to a hearing on a claim for asylum, withholding of removal, and Convention Against Torture claim violates 8 U.S.C. § 1231(b)(3) and the Due Process rights of Mr. Dong.

Congress passed the Refugee Act of 1980, P.L. 96-212, to implement the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees ("Protocol"), Jan. 31, 1967, 19 U.S.T. 6224, T.I.A.S. No. 6577 (1968), to which the United States acceded in 1968. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 438-439 (1987). The Protocol incorporates by reference Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951), *reprinted in* 19 U.S.T., at 6259, 6264-6276 ("Refugee Convention").

Similarly, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G. A. Res. 39/46, U.N., GAOR, 39 Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) ("Torture Convention" or "CAT") prohibits its signatory governments from repatriating individuals to another state "where there are substantial grounds for believing that he would be in danger of being subjected to torture." Torture Convention,

Article 3. The Foreign Affairs Reform and Restructuring Act of 1998, Pub.L. No. 105-277, § 2242, 1999 U.S.C.C.A.N. (112 Stat. 2681) ("FARR Act") implemented the Convention Against Torture in the U.S.

Notably, 8 U.S.C. § 1231(b)(3), the Torture Convention and the Protocol impose a clear and non-discretionary duty: the agencies responsible for carrying out expulsion, extradition, and other involuntary returns, *must* ensure that those subject to their actions may not be returned if they are likely to face persecution or torture. The government has repeatedly acknowledged that it would be unlawful to return an individual to a country where they would face persecution or torture:

> Withholding of removal is a mandatory form of relief that the Immigration Judge must grant if the applicant is found to have a clear probability of persecution in his or her country of origin. . . . This form of protection fulfills United States' treaty obligations. . . . The 1967 Protocol require[s] contract states to ensure that no refugee be returned to a country where his or her life would be threatened due to one of the five protected grounds for refugee status.

U.S. Department of Justice, Executive Office for Immigration Review, *FY 2005, Statistical Year Book*, Feb. 2006, available at: http://www.usdoj.gov/eoir/statspub/fy05syb.pdf#search=%22%22treaty%20obligations%22%20and%20%22withholding%20of%20removal%22%20and

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Similarly, INS explained in the Federal Register:

> Wherever possible, subsequent acts of Congress must be construed as consistent with treaty obligations. See e.g., *Cook v. United States*, 288 U.S. 102, 120 (1933) ("[a] treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed."). Here, Congress has not indicated an intent to modify the obligations imposed by Article 3. In fact, Congress has clearly expressed its intent that any exclusion of aliens described in section 241(b)(3)(B) of the Act from the protection of these regulations must be consistent with Article 3. The obligation not to return such an alien to a country where he or she would be tortured remains in effect. Thus, while this rule does not extend the advantages associated with a grant of withholding of removal to aliens barred under section 241(b)(3)(B) of the Act, it does ensure that they are not returned to a country where they would be tortured.

Department of Justice, Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, FR 9-99.

It is precisely for this reason that Congress created a procedure for ensuring that individuals previously deported but reentered had the opportunity to present his claims of fear of persecution.

Under this provision, "[i]f the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, [and] the alien is not eligible and may not apply for any relief under this chapter, ..." INA § 241(a)(5), 8 U.S.C. § 1231(a)(5). However, even an alien subject to § 241(a)(5) may seek withholding of removal under 8 U.S.C. § 1231(b)(3)(A) or under 8 C.F.R. §§ 241.8(e) and 208.31. In explaining the basis for this exception, INS stated that:

> Regulations published in February 1999 delegate authority to asylum officers to conduct reasonable fear screenings of certain aliens who are subject to INS reinstatement of a final order of deportation, exclusion, or removal or who are subject to INS removal under section 238(b) of the INA, based on an aggravated felony conviction. The INA precludes such aliens from applying for immigration benefits, but at the same time the United States must comply with treaty obligations not to return an alien to a country where he or she would be persecuted or tortured. Therefore, if such an alien seeks to apply for withholding of removal based on fear of persecution or torture, an asylum officer will conduct an interview to determine whether the alien has a reasonable fear of persecution or torture. If a reasonable fear is found, the alien is referred to an immigration

> judge to apply for withholding or deferral of removal to the country where persecution or torture is feared.

U.S. Department of Justice, *Asylum Reform, 5 Years Later* (2000), available at: http://www.uscis.gov/graphics/services/asylum/asylum_brochure.pdf (last accessed November 13, 2007).

Notably, the provisions of the law providing for a reasonable fear interview do not make an exception for those removed as a result of a denial of asylum claim. Neither do the laws and treaties that give rise to the U.S. obligations. Thus, if the U.S. is prohibited from returning an individual to a place where he or she faces persecution or torture, then the U.S. cannot do it under any circumstance.

The fact that a procedure already exists for some classes of aliens to present their claims demonstrates that prohibiting another class in similar circumstances would violate basic canons of due process and equal protection. The Supreme Court, in *Bridges v. Wixon,* 326 U.S. 135, 154 (1945), held that "[t]hough deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty – at times a most serious one – cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." Further, the Supreme Court has found that the fundamental

requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). As the Board noted in *Matter of Pula*, "the danger of persecution should generally outweigh all but the most egregious of adverse factors." 19 I&N Dec. 467, 474 (BIA 1987).

Yet here, under the Board's reading of the statute, and the Seventh Circuit's deference to that reading, there will *necessarily* be circumstances where an alien faces persecution or torture and yet has no avenue to have the Attorney General consider his or her claim for protection. The Board's authority under 8 C.F.R. § 1003.23(b)(1) to reopen any matter *sua sponte* is legally insufficient, as the Board's *sua sponte* authority is "entirely discretionary," *Azmond Ali v. Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006), whereas the prohibition against removal to persecution and/or torture is non-discretionary. Therefore, the Board's reading of the statutes in question, and this Court's affordance of deference to that reading, necessarily creates a paradigm where removal to persecution will be permitted simply due to the time and numerical restrictions on motions to reopen. Such a reading cannot possibly be correct, and therefore, rehearing is warranted.

II. 8 U.S.C. § 1229A IS NOT THE SOLE PROCEDURE FOR PURSUING AN ASYLUM APPLICATION

1. The Statute Does Not Require a Motion to Reopen

The Seventh Circuit's reliance on *Chen,* 498 F.3d at 759-61, where it afforded deference to the Board's conclusion that a motion to reopen was required in all circumstances after completion of removal proceedings was contrary to the statutory and regulatory framework, as well as the legislative history and intent.

In *Matter of C-W-L-*, 24 I&N Dec. 346 (BIA 2007), like the Seventh Circuit did in *Chen*, the Board asserted that a motion to reopen is always required. Specifically the Board stated:

> Moreover, even if the respondent might later argue that the Immigration Court is a proper tribunal to first adjudicate a motion to file a successive asylum application, the regulations require that *all* asylum applications filed with the Immigration Court after the close of removal, deportation, or exclusion proceedings be accompanied by a properly filed motion to reopen. 8 C.F.R. § 1208.4(b)(3)(ii).

Id. at 351 (emphasis in original).

This claim – that the regulations require a motion to reopen for *all* (emphasis provided by the Board) asylum applications – is directly contradicted

by the language of the statute and regulation upon which the Board relied. Nowhere in 8 U.S.C. § 1229a(c)(7)(C)(ii) or in 8 C.F.R. § 1208.4(b)(3)(ii) is there an indication that a motion to reopen is *always* required – it simply states the limitations that exist *when* a motion to reopen is required. Thus, it is respectfully asserted that *Chen* was wrongly decided in affording deference to the Board's decision, and consequently, the Seventh Circuit erred below in declining to revisit *Chen*.

While INA §§ 240 (c)(7)(C)(ii), 8 U.S.C. § 1229a (c)(7)(C)(ii) provides the basis for reopening on changed country conditions, it does not state that a motion to reopen is always required; nor does it state that it is the "sole and exclusive procedure" for pursuing a claim for asylum. In fact, 1229a states the opposite; 1229a(a)(3) provides that "*[u]nless otherwise specified in this Act*, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States . . . " 8 U.S.C. § 1229a(a)(3) (emphasis added). Since 8 U.S.C. § 1158(a)(2) specifies the right to have an asylum claim adjudicated after an IJ proceeding has closed, it grants a right "otherwise specified in [the] Act" which § 1229a does not purport to diminish.

The regulations support this reading of the statute. 8 C.F.R. § 1208.4(b)(3)(ii) provides that "[a]fter completion of exclusion, deportation, or removal proceedings," an asylum application may only be filed with the Immigration Court in conjunction

with a "motion to reopen pursuant to 8 C.F.R. part 1003 *where applicable*." 8 C.F.R. § 1208.4(b)(3)(ii) (emphasis added). The inclusion of the words "where applicable" is an unmistakable indication that there are instances where a motion to reopen would not be required. Yet the Seventh Circuit here, and in *Chen*, failed to acknowledge this language, rendering it entirely superfluous.

Further, the regulatory history related to INA § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D) makes clear that the Department of Justice determined that changed personal circumstances materially affecting one's eligibility for asylum constitute an instance where no motion to reopen is required. In other words, the DOJ has enacted regulations to give legal effect to their legal conclusion that § 1229a is inapplicable to successive asylum applications. *Compare* Proposed 8 C.F.R. § 208.4 (requiring a motion to reopen) (found at 62 FR 444, 463) *with* 8 C.F.R. § 208.4 (dropping the motion to reopen requirement). This change was explained in comments that accompanied the final published regulation, in which the DOJ acknowledged that it "has decided to drop the requirement that, for purposes of the prohibition in section 208(a)(2)(C), such exception may only be raised through a motion to reopen." 62 FR 10312 (March 6, 1997).

Congress, by the DOJ's own acknowledgement, has created a broader exception for the limited circumstance of individuals with a changed personal circumstance such that they face persecution or

torture. Because the DOJ declined to expand the exceptions to the motion to reopen requirement, it dropped the motion to reopen requirement to give effect to 8 U.S.C. § 1158(a)(2)(D). Thus, it is respectfully asserted that the finding that the statute and regulations require a motion to reopen was legally erroneous. As such, the Seventh Circuit should have revisited *Chen*; to remedy this error, this Court should grant this Petition.

2. The Seventh Circuit and Board's reading of the statute would render an act of Congress meaningless

To read into the statute and regulations a distinction that does not exist would render the statute and regulations meaningless. According to the BIA's decision given deference by the Seventh Circuit, an alien can use § 1158(a)(2)(D) when their asylum application has been denied by an Immigration Judge but not yet become a final order, but must comply with the motion to reopen requirements if their order has become a final order of removal. *See Chen*, 498 F.3d at 760; *see also Matter of C-W-L-*, 24 I&N 346 (BIA 2007). However, such a requirement cannot be upheld.

An alien who is in removal proceedings (either their asylum application is before an immigration judge or, having been denied by the IJ, on appeal to the Board), does not need to benefit from § 1158(a)(2)(D). The only circumstance where § 1158(a)(2)(D) could be

applicable is where there are "[c]hanged circumstances arising after the denial of the application but before the alien's departure or removal from the United States shall only be considered as part of a motion to reopen. . . ."

When new and previously unavailable facts occur and/or evidence becomes available while a case is pending before the IJ, an alien may simply amend their original asylum application. *See e.g., Zhang v. Gonzales*, 452 F.3d 167, 170 (2d Cir. 2006) ("The following year . . . petitioner amended her asylum application to claim that she feared future persecution, including sterilization, if returned to China. To support this claim, Yan Fang Zhang offered evidence of her March 2002 marriage to Jian Di Zheng, another Chinese immigrant, whom petitioner met in the United States and by whom she had two daughters, the first born in September 2000 and the second born in April 2002."); *Jing Shu Jiang v. Gonzales*, 219 Fed.Appx. 195, 196 (3d Cir. 2007) (noting that a Chinese couple was able to submit an amended asylum application where, after a prior asylum application was pending, they had U.S. born children).

When new and previously unavailable facts occur and/or evidence becomes available while a case is pending before the Board, a motion to remand can be submitted. *See* 8 C.F.R. 1003.1(d)(3)(iv) (enunciating that "the Board will not engage in factfinding in the course of deciding appeals . . . " and where additional factfinding is required, the matter should be remanded to the Immigration Judge); *see e.g., Cao v.*

U.S. Dep't of Justice, 421 F.3d 149, 157 (2d Cir. 2005) (finding that proof of the birth of a child in the U.S. to a Chinese national while a prior asylum denial was on appeal "fulfilled [an asylum applicant's] obligation to recite and corroborate the existence of new evidence that would be presented at a new hearing" such that the Board erred as a matter of law in denying a motion to remand).

The Board's reading of 8 U.S.C. § 1158(a)(2)(D) to reattach the requirement that when there are "[c]hanged circumstances arising after the denial of the application but before the alien's departure or removal from the United States shall only be considered as part of a motion to reopen. . . ." would therefore render it entirely superfluous, and thus invalidate an act of Congress to provide an avenue to submit and have adjudicated successive and untimely asylum applications. *See U.S. v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) (Congress is presumed not to have intended absurd or impossible results); *United Sav. Ass'n v. Timbers of Inwood Forest*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear . . . or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law. . . ."). Further, the Board's assertion that 8 U.S.C. § 1158(a)(2)(D) can only be used before the order of

removal ripens into a final order of removal is contradicted by the language of the applicable regulations.

As noted above, § 1158(a)(2)(C) states that the right to apply for asylum does not exist "if the alien has previously applied for asylum and had such application denied." INA § 208(a)(2)(C), 8 U.S.C. § 1158(a)(2)(C). According to 8 C.F.R. § 1208.4, "*for the purposes of section 1158(a)(2)(C), an asylum application has not been denied unless denied by an immigration judge and/or the Board of Immigration Appeals.*" 8 C.F.R. § 1208.4 (emphasis added). Thus, the only time the bar contained in 8 U.S.C. § 1158(a)(2)(C) against second (i.e., successive) asylum applications is applicable is in circumstances where the BIA has denied the prior application after an appeal – in other words, where there is already a final order of removal. Thus, 8 U.S.C. § 1158(a)(2)(D), which explicitly provides an exception to § 1158(a)(2)(C) for changed personal circumstances, can only be applicable where a prior asylum application has "been *denied by an immigration judge and/or the Board of Immigration Appeals.*" 8 C.F.R. § 1208.4 (emphasis added). In other words, the only time 8 U.S.C. § 1158(a)(2)(D) is applicable is when the alien already has a final order of removal.

Thus, there is no requirement that a motion to reopen need be submitted. As such, this Court is respectfully urged to grant this Petition to address the deficiency of the Seventh Circuit's decision deferring to a prior erroneous decision affording deference to the Board.

3. Because the Board worked substantive changes to the regulations, new notice and comment hearings would be required before any changes would have legal effect

Because the Department of Justice already expressly dropped the requirement that "[c]hanged circumstances arising after the denial of the application but before the alien's departure or removal from the United States shall only be considered as part of a motion to reopen. . . . ," it cannot now add the requirement without new notice and comment hearings. Thus, even assuming, *arguendo*, that the Board's substantive changes did not impermissibly invalidate an act of Congress (although it did) the Board's underlying decision in this matter, in *Chen*, and in *Matter of C-W-L-*, 24 I&N 346 (BIA 2007) have no legal effect, or at the very least, are entitled to no deference at all.

When a regulation is enacted pursuant to the notice and comment rulemaking process, the agency cannot unilaterally alter those rules without subjecting the changes to the regulation to the notice and comment rulemaking process. As the D.C. Circuit held, "new rules that work substantive changes in prior regulations" that had been adopted through the notice and comment process must undergo the same notice and comment process. *Sprint Corp. v. FCC*, 315 F.3d 369, 374-377 (D.C. Cir. 2003). The Third Circuit has also found that notice and comment hearings are required when legislative rules issued by an agency

"'work substantive changes in prior regulations' . . . or 'create new law, rights, or duties.'" *SBC Inc. v. Federal Communications Comm'n*, 414 F.3d 486, 497 (3d Cir. 2005) (quoting *Sprint Corp.*, 315 F.3d at 374 and *Fertilizer Institute v. U.S. EPA*, 935 F.2d 1303, 1307-08 (D.C. Cir. 1991)).

Moreover, even assuming, *arguendo*, that the Board's alteration of 8 C.F.R. § 208.4 to add the motion to reopen requirement (which had explicitly been dropped) is not required to undergo the notice and comment rulemaking process, that alteration is certainly entitled to no deference by the courts. As the D.C. Circuit explained, where an agency has inconsistently interpreted and applied the statute, failed to provide adequate explanation for its decisions, and adopted a construction that frustrates Congressional intent, the agency's interpretation is entitled to no deference at all. *See Bush-Quayle '92 Primary Comm. v. Fed. Election Comm'n*, 104 F.3d 448, 452-54 (D.C. Cir. 199[illegible]). And as Justice Scalia, writing for a unanimous Court stated:

> Though the agency's discretion is unfettered at the outset, if it announces and follows – by rule or by settled course of adjudication – a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as "arbitrary, capricious, [or] an abuse of discretion" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

I.N.S. v. Yueh-Shaio Yang, 519 U.S. 26, 32 (1996); *see also Virk v. INS*, 285 F.3d 1055, 1059 (9th Cir. 2002) (same).

Thus, the Board's decision was entitled to no deference, let alone *Chevron* deference. Therefore, it is respectfully asserted that the Seventh Circuit erred in deferring to a case where it afforded *Chevron* deference to the Board's decision on this issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the
United States Court of Appeals
for the Seventh Circuit

No. 07-2961

LI FANG HUANG,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney General of the United States,

Respondent.

No. 07-3322

MING DUNG, also known as MING DONG,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney General of the United States,

Respondent.

No. 07-3673

XIU QIN ZHENG, also known as XUIQIN ZHENG,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney General of the United States,

Respondent,

No. 07-3840

XUE JIN LI,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney General of the United States,

Respondent.

Petitions to Review Orders of the Board of Immigration Appeals. Nos. A77-651-879, A-74-762-766, A77-847-340, A78-125-604.

Argued July 9, 2008 – Decided July 15, 2008*

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* This opinion is being released in typescript in advance of publication.

Before POSNER, SYKES, and TINDER, Circuit Judges.

POSNER, Circuit Judge. We have consolidated for decision four petitions to review orders by the Board of Immigration Appeals denying petitions to reopen removal proceedings. The petitions to review present overlapping and to a degree identical issues.

In *Kucana v. Mukasey,* No. 07-1002, 2008 WL 2639039 (7th Cir. July 7, 2008), this court held that we do not have jurisdiction to review petitions to reopen removal proceedings, including proceedings in which the alien sought asylum, unless the petition to review the Board of Immigration Appeals' denial of reopening presents a question of law. The facts that the Board finds, and the reasons that it gives, en route to exercising its discretion to grant or deny a petition to reopen a removal proceeding, and the discretionary decision itself, cannot be reexamined by a court, whether for clear error, lack of substantial evidence, abuse of discretion, or any other formulation of a ground for reversing an administrative decision; all the court can decide is whether the Board committed an error of law. *See also Emokah v. Mukasey,* 523 F.3d 110, 119 (2d Cir. 2008). That will usually be a misinterpretation of a statute, regulation, or constitutional provision. *Kucana v. Mukasey, supra,* at *2-4; *Zeqiri v. Mukasey,* 529 F.3d 364, 369 (7th Cir. 2008); *Cevilla v. Gonzales,* 446 F.3d 658, 661 (7th Cir. 2006); *Chen v. U.S. Dep't of Justice,* 434 F.3d 144, 153 (2d. Cir. 2006); *Almuhtaseb v. Gonzales,* 453 F.3d 743, 748 (6th Cir. 2006). But it could also be a

misreading of the Board's own precedent, as in *Ssali v. Gonzales,* 424 F.3d 556, 564-66 (7th Cir. 2005), or the Board's use of the wrong legal standard, as in *Azanor v. Ashcroft,* 364 F.3d 1013, 1019-21 (9th Cir. 2004), or simply a failure to exercise discretion or to consider factors acknowledged to be material to such an exercise. *Kucana v. Mukasey, supra,* at *4; *see also Hanan v. Mukasey,* 519 F.3d 760, 764 (8th Cir. 2008) ("wholesale failure to consider evidence").

The category of reviewable determinations is illustrated by a case this court decided the day after the *Kucana* decision. *Lin v. Mukasey,* No. 07-3719, 2008 WL 26252776 (7th Cir. 2008). A Chinese woman who gave birth to two children in the United States sought asylum on the ground that if returned to China she would be forced to undergo sterilization for having violated China's "one child" policy. Her application for asylum was rejected and she was ordered removed to China. She remained in the United States illegally but later sought to reopen her removal proceeding on the basis of changed conditions in China – namely, more vigorous enforcement of the one-child policy than when she had been ordered removed, creating a grave risk that she would be subjected to sterilization. In the course of denying the petition, the Board made a statement that the government's lawyer represented to us at argument meant that if the sanction for violating the one-child policy is a fine (called a "social compensation fee"), there can be no inference of persecution even if the fine is so steep that the violator will be unable to pay

it and in consequence will be ordered sterilized. Such a view would be inconsistent with (and a misreading, rather than a deliberate, reasoned rejection of) countless Board and court decisions and an unreasonable interpretation of the federal statute that makes "resistance to a coercive population control program" a ground for asylum. *Id.* at *1-2; 8 U.S.C. § 1101(a)(42)(B). And so the Board's denial of the petition to reopen was not insulated from our review.

One of the cases before us today, Li's case, No. 07-3840, is almost identical to *Lin,* but with the critical difference that rather than suggesting that forced sterilization is not persecution as long as it just backs up the "social compensation fee," the Board found that there was no indication that the fee to which Li might be subjected if she were returned to China and punished for violating the one-child policy would be so stiff as to place her in danger of being forced to undergo sterilization as a sanction for failing to pay it. The Board did not intimate, as it had in *Lin,* that so long as forced sterilization is used merely against people who fail to pay the fee for having more than one child, it is not persecution. Li is in the position therefore of merely disagreeing with the weight that the Board placed on the various items of evidence (country reports, provincial regulations, an unauthenticated notice from the government of Li's village, etc.) en route to its discretionary denial of the petition to reopen. No question of law is presented. We therefore have no jurisdiction to decide whether the petition should have been granted.

In contrast, Zheng's case, No. 07-3673, involves an arguable error of law. He had come to the United States from China in 1999 and had sought asylum on the ground that he had been persecuted for belonging to an underground Catholic church and for opposing China's "one child" policy; he claimed that his wife had been forced to have an abortion when she became pregnant a second time. (Whether the husband of a woman forced to have an abortion is automatically entitled to asylum, or must show that he opposed the one-child policy, has divided the circuits. *Compare Shi Liang Lin v. U.S. Dep't of Justice,* 494 F.3d 396 (2d Cir. 2007) (en banc), *with* cases cited at *id.* at 400 n. 4. But Zheng claims to have opposed the policy.) The immigration judge denied asylum after an evidentiary hearing in 2001. A letter purporting to be from Zheng's former employer in China said that he was being fired because his wife had had a second child, and this contradicted Zheng's claim about the abortion. And the letter was dated after Zheng arrived in the United States, although he testified that it had been given to him in China when, and in explanation for why, he was fired. He submitted an abortion certificate but the immigration judge found that China issues such certificates only when the abortion is voluntary. There were other contradictions and anomalies and in addition Zheng was unable to answer elementary questions about Catholicism (such as what communion is) and admitted never having attended a Catholic service in the United States. The immigration judge was skeptical that Zheng had ever

been a Catholic, and rejected the claim of persecution on account of either religion or the one-child policy.

In 2007 Zheng moved to reopen the removal proceeding, primarily on the ground of changed country conditions – China's more vigorous enforcement of the one-child policy after 2001, which we discussed in *Lin*. In support Zheng presented affidavits from himself and his wife, along with purported letters from an underground Catholic church in China and his village government that indicate that if returned to China he will be punished for having joined the church. The affidavits state that his wife, who remains in China, has been beaten in an effort to induce him to return to China to face the music. The Board discounted the evidence presented in support of the petition because the claim of persecution had been rejected by the immigration judge in the removal proceeding.

The fact that evidence presented in support of a claim of asylum is rejected as noncredible has been held not to foreclose the reopening of the removal proceeding on a separate ground. *Gebreeyesus v. Gonzales,* 482 F.3d 952, 955 and n. 3 (7th Cir. 2007); *Mansour v. INS,* 230 F.3d 902, 908 (7th Cir. 2000); *Guo v. Gonzales,* 463 F.3d 109, 114 (2d Cir. 2006); *Guo v. Ashcroft,* 386 F.3d 556, 562 (3d Cir. 2004); *Kamalthas v. INS,* 251 F.3d 1279, 1284 (9th Cir. 2001). Those holdings are rulings of law, and if the Board has rejected them, by holding that an immigration judge's refusal to credit any part of an asylum applicant's testimony precludes reopening even if the

disbelieved testimony is at once inconsequential and unrelated to the grounds presented in the petition to reopen, its rejection would present a question of law that we would have jurisdiction to consider. But all the Board did in Zheng's case was refuse to allow his petition to reopen to be used as a vehicle for reopening credibility issues. The immigration judge had not ruled that discrimination against Zheng on the basis of his belonging to an underground Catholic church could not amount to persecution, and this would be consistent with his facing persecution if returned to China, because the government has intensified its opposition to such churches. The immigration judge had simply disbelieved Zheng's testimony that anything had happened to him because of his belonging to a Catholic church, and even doubted whether Zheng is really a Catholic.

Since Zheng had been found to have lied at the hearing about both his claims, religious and population-policy persecution, he would have had to present evidence in support of reopening that was in no way dependent on his discredited credibility in order to establish a well-founded fear of persecution on the same grounds if he is returned to China. *Guo v. Ashcroft, supra,* 386 F.3d at 562; *cf. Guo v. Gonzales, supra,* 463 F.3d at 114. His own and his wife's affidavits, and unauthenticated and possibly fraudulent documents purportedly from the church and the village government, were not evidence that could be assumed to be uncontaminated by his demonstrated propensity to lie to obtain asylum. The Board is not

required to ignore such a propensity in assessing such evidence, and so its decision in Zheng's case is within its discretionary authority and therefore unreviewable by us.

We turn to Huang's case, No. 07-2961. Huang, a Chinese woman, entered the United States in 1999 on false documents. In 2002 she applied for asylum, claiming that she had fled China because the government, in an effort to induce her to marry a man whom she didn't want to marry, had forced her to have an abortion (she was pregnant by her boyfriend) and had seized her family's land. She failed to appear at her hearing before an immigration judge and was ordered removed. In 2006 she filed a motion to reopen, arguing that she had missed the hearing because she had not known when and where it would be held; earlier, however, she had said that she had not attended because she was afraid that she would be arrested and removed if she did. Later she changed her story back to the original one. The Board denied the petition, and the following year she filed a second petition to reopen, this one on the ground that she had received ineffective assistance at her first hearing. She claimed that she had missed her hearing because of a stomach ache and that her then lawyer had failed to explain this to the immigration judge.

The Board denied the second petition as untimely. The deadline for the filing of a petition to reopen (180 days in Huang's case, 8 U.S.C. §§ 1229a(b)(5)(C)(i), (c)(7)(C), from the date of the final order of removal, *Pervaiz v. Gonzales*, 405 F.3d

488, 490 (7th Cir. 2005); *Guerrero-Santana v. Gonzales,* 499 F.3d 90, 92-93 (1st Cir. 2007)) can be equitably tolled because the statutory deadline is not jurisdictional. *Pervaiz v. Gonzales, supra,* 405 F.3d at 490, and cases cited there. But the Board refused to allow Huang's very late filing of a second petition because it disbelieved the stomach ache story. As in Li's case, no question of law is presented by the petition to review the denial of reopening, and so we have no jurisdiction.

Had the Board refused to reopen the removal proceeding because it did not think that Huang had received ineffective assistance from her lawyer, rather than because the petition to reopen had been untimely, the petition for review might be thought to present a question of law. Or might not; the issue is treated inconsistently in our cases. *Compare Sanchez v. Keisler,* 505 F.3d 641, 647-48 (7th Cir. 2007); *Kay v. Ashcroft,* 387 F.3d 664, 676 (7th Cir. 2004), indicating "yes," *with Patel v. Gonzales,* 496 F.3d 829, 831 (7th Cir. 2007), indicating "no," and *Nativi-Gomez v. Ashcroft,* 344 F.3d 805, 807-09 (7th Cir. 2003), and *Stroe v. INS,* 256 F.3d 498 (7th Cir. 2001), both leaning to "no." We need not try to eliminate the inconsistency in this case.

That leaves Dung's case, No. 07-3322. It is another one-child case, indistinguishable from *Li* except that Dung further argues that he should be allowed file a second asylum application after the first is denied, without having to file a petition to reopen. As he recognizes, we rejected the identical contention in

Cheng Chen v. Gonzales, 498 F.3d 758 (7th Cir. 2007), and he has presented no reason to suggest that our decision should be reexamined.

The petition in *Li* and *Huang* are dismissed for want of jurisdiction. The petitions in *Zheng* and *Dung,* which complain about both the Board's exercise of its discretion to deny a petition to reopen and alleged errors of law committed by the Board, are dismissed in part and denied in part. *Saintha v. Mukasey,* 516 F.3d 243, 249-53 (4th Cir. 2008); *Emokah v. Mukasey,* 523 F.3d 110, 119 (2d Cir. 2008).

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board
of Immigration Appeals

Date: SEP 10 2007

File: A74 762 766 – Chicago, IL

In re: MING *DUNG* a.k.a. Ming Dong

IN EXCLUSION PROCEEDINGS

MOTION

ON BEHALF
OF APPLICANT: Theodore Cox, Esquire

ON BEHALF OF DHS: Mirta Woodall
Assistant Chief Counsel

ORDER:

PER CURIAM. This case was last before the Board on December 17, 2002, when we summarily affirmed the Immigration Judge's May 5, 2000, denial of the applicant's application for asylum, withholding of deportation, and request for protection under the Convention Against Torture. The applicant submitted a motion to reopen on March 26, 2007. His motion is not predicated on any past persecution, but instead asserts a fear of future persecution, alleging he will be subject to "sterilization, imprisonment, and torture if repatriated" to his native country of China because

he has two United States citizen children.[1] The motion is denied.

We initially note the applicant's motion is untimely as it was filed almost five years after the Board's decision, well after the 90-day deadline for such submissions. 8 C.F.R. § 1003.2(c)(2). This time limit does not apply to an applicant relying on new evidence of changed country conditions, where that evidence could not have been discovered or presented at the original hearing. 8 C.F.R. § 1003.2(c)(3)(iii). However, a change in an individual's personal circumstances, as alleged here, does not qualify under this exception. Rather, an individual must demonstrate that the country conditions have changed in order for this exception to apply. *See Li Yong Zheng v. U.S. Dep't of Justice*, 416 F.3d 129, 130-31 (2d Cir. 2005) (per curiam).

We find no merit to the applicant's argument that section 208(a)(2)(D) of the Immigration and Nationality Act; 8 U.S.C. § 1158(a)(2)(D) independently allows for the filing of a successive asylum application without the showing of changed country conditions required by section 240(c)(7)(C) of the Act; 8 U.S.C. § 1229a(c)(7)(C). Such a reading would render section 240(c)(7)(C)(ii) superfluous in violation of the rule

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[1] The motion appears to be a boilerplate submission. In this regard we observe it contends the applicant, a man, will be subject to "forced abortion or sterilization" (Motion at 2), and cites a Board decision dated October 12, 2006, although no such decision was issued in his case (Motion at 4).

that courts must give effect to every clause and word of a statute, if possible. *Williams v. Taylor*, 529 U.S. 362, 404 (2000). The more broadly worded general exception in section 208(a)(2)(D) of the Act makes clear that successive asylum applications are not prohibited under certain circumstances, *e.g.*, in conjunction with a timely filed motion to reopen or prior to a final order of removal. The more specific provision at section 240(c)(7)(C) of the Act, addressing late motions to reopen to reapply for asylum, however, makes clear that the requirements of section 240(c)(7)(C)(ii) of the Act must be met in order to apply for asylum in conjunction with an untimely motion to reopen. As discussed above, the applicant has not met the requirements of section 240(c)(7)(C)(ii) of the Act. Contrary to the applicant's arguments, the birth of children in the United States is a change in personal circumstances and does not qualify as a change in circumstances or country conditions "arising in the country of nationality" so as to create an exception to the time limitation for filing a late motion to reopen to apply for asylum (Motion at 15-18). *See Matter of C-C-*, 23 I&N Dec. 899 (BIA 2006); 8 C.F.R.§ 1003.2(c)(3)(ii).

The applicant has submitted numerous documents in support of his motion, alleging that circumstances in China have changed such that he is now eligible for relief. However, many of these documents have already been considered by this Board and addressed in our precedent decisions, including *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007) and

Matter of J-W-S, 24 I&N Dec. 185 (BIA 2007). We concluded in *Matter of S-Y-G, supra*, that this evidence[2] does not show a material change in the family planning policy of Fujian Province[3]. We likewise find that this evidence, and the additional documents provided by the applicant with the instant motion, do not demonstrate a material change in circumstances in China since the date of the prior hearing. The applicant has not demonstrated that he will be sterilized or otherwise subjected to coercive population control measures due to the birth of two foreign-born children. The applicant, therefore, has not established an exception to the jurisdictional bar to reopening the proceedings.

In closing, we recognize the applicant's suggestion that proceedings should be reopened in the interests of family unity and justice (Motion at 18-22). However, we do not find that the facts presented represent exceptional circumstances warranting the exercise of our *sua sponte* authority. *See Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997) (Board retains limited

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[2] Including the affidavit from John Aird, and the documentation cited in *Shou Yung Guo v. Gonzales*, 463 F.3d 109 (2d Cir. 2006), referenced in the applicant's motion (Motion at 16-18). *See Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007); *Matter of J-H-S-*, 24 I&N Dec. 196 (BIA 2007); *Matter of J-W-S*, 24 I&N Dec. 185 (BIA 2007).

[3] In his application for asylum the applicant reports that prior to coming to the United States he resided in Fuzhou City in Fujian Province (Motion, tab A).

discretionary power under the regulations to reopen or reconsider only in exceptional circumstances); 8 C.F.R. § 1003.2(a).

Accordingly, the motion to reopen is denied.

/s/ [Illegible]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
5201 Leesburg Pike, Suite 2000
Falls Church, VA 22041

In the matter of	)
DONG, Ming A 74 762 766	)
Respondent	)

MOTION TO REOPEN BASED ON CHANGED COUNTRY CONDITIONS PURSUANT TO INA § 240(c)(7)(C)(ii)

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(212) 925-1208

CERTIFICATE OF SERVICE

I certify that on March 22, 2007, a copy of this motion and attached documents were served by MAIL on the DHS, Bureau of Immigration and Customs Enforcement, Office of the District Counsel, 55 East Monroe Street, Suite 1700, Chicago, IL 60603.

/s/ Jiang Lu
Jiang Lu

MOTION TO FILE SUCCESSIVE APPLICATION FOR ASYLUM, WITHHOLDING OF REMOVAL UNDER THE INA, AND RELIEF UNDER ARTICLE III OF THE CONVENTION AGAINST TORTURE PURSUANT TO INA § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D)

Respondent, DONG ming, by and through counsel, hereby moves this Honorable Court to accept the filing of a successive application for asylum, withholding of removal under the INA, and relief under Article III of the Convention Against Torture pursuant to INA § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D). Under this section of the INA, Respondent is not required to reopen his prior asylum application as there is "the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing the application within the period specified. . . ." INA § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D).

Respondent, Dong, Ming, a native and citizen of the People's Republic of China, and has two United States born and citizen children. He married his wife, Rong Lin, on November 25, 2002 in New York, NY. Their first child, a son, Evan Dong, was born on September 8, 2003 in Barron, WI. Their second child, a daughter, Jessica Dong, was born on December 28, 2005 in New York, NY. As such, he is subject to China's despotic one-child family planning policies, and faces fines, forced abortion or sterilization, imprisonment, and torture if repatriated.

LEGAL STANDARDS

1. Successive Asylum Applications

In general, non-citizens in the United States who are seeking asylum must file their applications for asylum within one year after their arrival in the United States. INA §208(a)(2)(B), 8 U.S.C. §1158(a)(2)(B). In addition, an alien may only file one application for asylum. INA §208(a)(2)(C), 8 U.S.C. §1158(a)(2)(C). However, the one-year and one-asylum application restrictions do not apply when the alien demonstrates "the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing the application within the period specified. . . ." INA § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D).

2. Motions to Reopen

A wholly separate provision of the law applies to motions to reopen. In general, an alien may only file one motion to reopen, and that motion must be filed within 90-days of the Board's decision sought to be reopened, except in instances of "changed country conditions arising in the country of nationality or the country to which removal have been ordered. . . ." INA §§ 240(c)(6)(A) and (c)(6)(C)(ii), 8 U.S.C. § 1229a(c)(6)(A) and (c)(6)(C)(ii); *see also* 8 C.F.R. § 1003.2(c)(2) (same).

ARGUMENT

A. Jurisdiction Lies With the Immigration Court To Adjudicate Respondents's Applications for Asylum, Withholding of Removal Under the INA, and Withholding of Removal Under the Convention Against Torture

A review of the application regulations demonstrates that the Immigration Judge has jurisdiction over Respondent's applications for asylum and related relief.

8 C.F.R. § 208.2(b) provides that "Immigration judges shall have exclusive jurisdiction over asylum applications filed by an alien who has been served a Form I-221, Order to Show Cause; Form I-122, Notice to Applicant for Admission Detained for a Hearing before an Immigration Judge; or Form I-862, Notice to Appear, after the charging document has been filed with the Immigration Court."

Moreover, 8 C.F.R. § 208.4(b)(ii) provides that, for individuals filing for asylum "[a]fter completion of exclusion, deportation, or removal proceedings, and in conjunction with a motion to reopen pursuant to 8 CFR part 3 *where applicable*,"[1] the filing should be

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[1] The inclusion of the requirement that a motion to reopen only need be filed "where applicable," is evidence that a motion to reopen is not required in every circumstance. As will be demonstrated below, a motion to reopen is not required or applicable to the case at bar.

made "with the Immigration Court having jurisdiction over the prior proceeding." *Id.* (emphasis added) Therefore, the plain, unambiguous language of the regulations give the Immigration Court jurisdiction over the applications of Respondent.

B. The Laws and Procedures Have Changed Since Respondent's Previous Motion

In the time since Respondent submitted his prior motion, both the law and this Court's procedures have changed, such that Respondent is now eligible for previously unavailable relief. In particular, the Clerk's Office for the Immigration Court (EOIR) of 26 Federal Plaza, has changed its policies and now accepts these motions. As such, Respondent can now apply for relief that he was not eligible (or able to) apply for.

Further, the Board's decision of October 12, 2006, was predicated, in part, upon the Second Circuit's decision in *Wang v. Board of Immigration Appeals,* 437 F.3d 270 (2d Cir 2006) and the Board's decision of *Matter of C-C-,* 23 I&N Dec. 899 (BIA 2006). However, since that time, new documents have come to light indicating that Chinese nationals with U.S. born children will be treated the same as Chinese nationals with Chinese born children under China's one-child family planning policies. This evidence has led the Second Circuit to remand a litany of cases back to the Board involving U.S. born children.

In *Shou Yung Guo v. Gonzales*, 463 F.3d 109 (2d Cir. 2006), the Court remanded the case to the BIA for further consideration of materials overlooked by the BIA in denying a motion to reopen. The Court concluded that the BIA had failed to sufficiently examine the Fujian province family planning decision documents. *Id.* at 113. The Court quoted from one document which indicated that:

> [N]o exception or waiver shall be applicable to Chinese nationals and citizens who engage in reproductive behavior overseas in violation of family-planning regulations as enforced in his or her area of residence of household registration in China. . . . Such Chinese nationals and citizens shall be subject to family-planning enforcement upon resettlement in China.

Id. (*quoting* Fujian Province Department of Family-Planning Administration).

In *Jin Xiu Chen v. U.S. Dep't of Justice,* 468 F.3d 109 (2d Cir. 2006), the Court took notice of the *Shou Yung Guo* documents despite the fact that they were not part of the record. *Id*; *see also Tian Ming Lin v. U.S. Dept. of Justice,* 468 F.3d 167, 169 (2d. Cir 2006). These documents have been deemed "too important to ignore." *Lin*, 468 F.3d at 169. These decisions demonstrate that *Wang v. Board of Immigration Appeals,* 437 F.3d 270 (2d Cir 2006) is no longer applicable as a proposition that, as a matter of law, Chinese nationals with U.S. born children do not have a fear of persecution or changed circumstances. Thus,

Respondent is eligible as a matter of fact and law, to apply for previously unavailable relief.

C. A Motion to Reopen is Not Required

Respondent is not required to submit a motion to reopen in order to pursue a second asylum application based upon changed personal circumstances. The INA explicitly authorizes successive and untimely (more then [sic] one year after arrival) asylum applications based upon "the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing the application within the period specified. . . ." INA § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D). This statute acts as an exception to the general requirement that an alien may only file one asylum application and such application must be filed within one-year of arrival in the United States. INA §§ 208(a)(2)(B) and (C), 8 U.S.C. § 1158(a)(2)(B) and (C).

Although "changed circumstances" is not defined by the statutory framework, the regulations state that such circumstances may include "[c]hanges in the applicant's circumstances that materially affect the applicant's eligibility for asylum, including changes in applicable U.S. law and activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk." 8 C.F.R. § 208.4(a)(4)(B). In other words, changed personal circumstances "that place the applicant at

risk" of persecution will permit untimely and successive asylum applications.

To file a successive and untimely asylum application, Respondent only need follow the above-outlined procedures, not the separate procedures for motions to reopen. However, if he were required to submit a motion to reopen his prior claim, he would be required to overcome the time and numerical limitations placed upon motions to reopen.

As a general rule, INA § 240 provides that an alien may only file one motion to reopen, and that motion must be filed within 90-days of the Board's decision sought to be reopened, except in instances of "changed country conditions arising in the country of nationality or the country to which removal has been ordered. . . ." INA §§ 240(c)(6)(A) and (c)(6)(C)(ii), 8 U.S.C. § 1229a(c)(6)(A) and (c)(6)(C)(ii); *see also* 8 C.F.R. § 1003.2(c)(2) (same).

This definition of "changed circumstances" is notably in conflict with the more expansive definition contained within 8 C.F.R. § 208.4(a)(4)(B), which defines "changed circumstances" as including "[c]hanges in objective circumstances relating to the applicant in the United States. . . ."

On first glance, this would create a legally and logically absurd paradigm whereby an alien is entitled to file an asylum application, but there is no procedure in which to do so – a Kafkaesque catch-22. However, the regulatory history of 8 C.F.R. § 208.4 *unambiguously* establishes that Respondent is not

required to reopen their prior claim in order to pursue the new claim. The Department of Justice's comments that accompanied the relevant regulations explicitly state that no such motion is required when pursuing a successive asylum application.

1. Proposed 8 C.F.R. §208.4: Motion to Reopen is Required

On January 3, 1997, following the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the Department of Justice opened for comment proposed amendments to the Code of Federal Regulations. With respect to 8 C.F.R. § 208 – the regulation dealing with filing applications for asylum – the DOJ proposed the following rule in January 1997:

> *§208.4 Filing the application* (1997 Proposed Rule)
>
> Except as prohibited in paragraph (a) of this section, asylum applications shall be filed in accordance with paragraph (b) of this section.
>
> (a) Prohibitions on filing. Section 208(a)(2) of the Act prohibits certain aliens from filing for asylum on or after April 1, 1997, unless the alien can demonstrate that the exceptions in section 208(a)(2)(D) of the Act apply. For the purpose of making determinations under section 208(a)(2) of the Act, the following rules shall apply:

. . .

(2) The term "changed circumstances" in section 208(a)(2)(D) of the Act shall refer to circumstances materially affecting the applicant's eligibility for asylum that have arisen:

(i) For the purpose of section 208(a)(2)(C) of the Act, since the denial of the last asylum application by the alien.

Changed circumstances arising after the denial of the application but before the alien's departure or removal from the United States shall only be considered as part of a motion to reopen under section 240(c)(6) of the Act and §§3.2, 3.23 and 103.5 of this chapter. . . .

62 FR 444, 463 (January 3, 1997) (emphasis added).

2. Final 8 C.F.R. §208.4: Requirement of Motion to Reopen is Dropped

The final promulgated regulations conspicuously omitted the requirement that "[c]hanged circumstances arising after the denial of the application but before the alien's departure or removal from the United States shall only be considered as part of a motion to reopen. . . ." *Compare* Proposed 8 C.F.R. § 208.4 (found at 62 FR 444, 463) *with* 8 C.F.R. § 208.4 (as adopted). This omission was explained by the DOJ's comments that accompanied the final published regulation:

> Regarding the changed circumstances exception in section 208(a)(2)(D) . . . [t]he Department has . . . decided to provide a better definition of this exception by indicating that the definition may include either changed conditions in the home country or changes in objective circumstances relating to the applicant in the United States, including changes in applicable U.S. law, that create a reasonable possibility that the applicant may qualify for asylum. ***Because of inconsistency between the formulation of changed circumstances in section 208(a)(2)(D) and the formulation in section 240(c)(5)(ii) of the Act . . . the Department has decided to drop the requirement that, for purposes of the prohibition in section 208(a)(2)(C), such exception may only be raised through a motion to reopen.***

62 FR 10312 (March 6, 1997) (emphasis added).

In addressing a request that the motion to reopen standards should be widened, the DOJ explained that:

> One commenter suggested that the time and numerical limitations for motions to reopen should be broader than changed country conditions, as provided in § 3.23(b)(4). The commenter asserted that IIRIRA contains a much broader exception for individuals to apply for asylum beyond the one year deadline and that it is inconsistent for the statute to provide these broader exceptions if eligible applicants will be barred from applying

> for asylum because of the stricter motion to reopen standard. As noted earlier, the Department has decided to drop the requirement that the changed circumstances exception to the one year filing deadline in section 208(a)(2) of the Act be raised only through a motion to reopen.

62 FR 10312.

This language could not be more clear on its face: An alien seeking to apply for a successive and untimely asylum application based upon materially changed personal circumstances need not reopen his or her prior asylum application pursuant to 8 C.F.R. § 1003.2 to apply for this relief.

Additionally, the statement of the DOJ only confirms the only possible interpretation of the statute to give it meaning. Applying the motion to reopen requirements would serve to exclude an entire class of individuals and thus invalidate an act of Congress to provide an avenue to submit and have adjudicated successive and untimely asylum applications. *See U.S. v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) (Congress is presumed not to have intended absurd or impossible results); *United Sav. Ass'n v. Timbers of Inwood Forest*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear . . . or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of

the law. . . ."); *U.S. v. Phipps,* 81 F.3d 1056, 1060 (11th Cir.1996) ("courts should refrain from construing statutory provision in way that renders meaningless another provision within same statute"); *Hughey v. JMS Dev. Corp.,* 78 F.3d 1523, 1529 (11th Cir.1996) (Congress is presumed not to have intended absurd results, and courts will not foolishly bind themselves to the plain language of the statute where doing so would compel an odd result).

In *Guan v. Board of Immigration Appeals,* the Second Circuit acknowledged that this procedure was available to an asylum applicant with personal changed circumstances. There, the Court dismissed Guan's petition for review because Guan had submitted a *motion to reopen* asserting changed personal circumstances. The Court found that personal circumstances did not act as an exception to the time and numerical limitations contained within the motion to reopen requirements. However, the Court explained that:

> Although we find no legal error or abuse of discretion in the BIA's denial of Guan's motion for reopening, another administrative remedy may still be open to Guan. Under 8 U.S.C. 1158(a)(2)(D), an alien may request permission to file a successive, untimely asylum application based upon "changed circumstances which materially effect [her] eligibility for asylum." The government agrees that the definition of such "changed circumstances" provided by 8 C.F.R. 208.4(a)(4) (2003) encompasses changed

> personal circumstances arising in the United States.

Guan, 345 F.3d at 49.

To the extent that there may be an ambiguity in the statute (although there is not), the rule of lenity *requires* the construction of "any lingering ambiguities in deportation statutes in favor of the alien." *Cardoza-Fonseca*, 480 U.S. at 449; *see also INS v. Errico*, 385 U.S. 214, 225 (1966) ("Even if there were some doubt as to the correct construction of the statute [INA § 241(f)], the doubt should be resolved in favor of the alien."); *Rosario v. INS*, 962 F.2d 220, 225 (2d Cir. 1992) (same).

Finally, refusing to permit Respondent to have a new hearing would lead to the absurd result of deporting an individual eligible for relief from removal and protection from persecution. This rationale has been followed by the Ninth and the Seventh Circuit, where it was held that "the INS should not deny reopening of an *in absentia* deportation order where the denial leads to the unconscionable result of deporting an individual eligible for relief from deportation." *Singh v. INS*, 295 F.3d 1037, 1040 (9th Cir. 2002); *see also Chowdhurry* [sic] *v. INS*, 241 F.3d 848 (7th Cir. 2001) (same). Looking at the "particularized facts presented," the Ninth Circuit in *Singh* concluded that the BIA regulations should not be interpreted in a manner that would cause the "absurd" result of "denying reopening and thereby requiring the

deportation of an individual with a valid claim for relief from deportation." *Singh*, 295 F.3d at 1040.

Similarly, in *Chowdhury,* the Seventh Circuit held that the BIA's regulations "should not be so strictly interpreted as to provide unreasonable, unfair, and absurd results." *Chowdhury,* 241 F.3d at 848. Therefore, it would be unreasonable, the Court stated, to require the alien to follow the "circuitous option" of returning to his home country when "the Board's own regulations, *read reasonably*, show that he is entitled to a hearing now." *Id.* (emphasis added).

Here, deporting Respondent would lead to the unconscionable result of deporting individuals eligible for relief. Moreover, as in *Singh*, it "would result in either the break-up of a family or if the family were to remain intact, the ouster of" Respondent's citizen children. *Singh,* 295 F.3d at 1040.

C. Respondent is Entitled To a Hearing on his Claim For Withholding of Removal under the INA and Withholding of Removal Under the Convention Against Torture

Respondent's motion explicitly includes the request for withholding of removal under the INA. A request for asylum *automatically includes a request for withholding of removal.* 8 C.F.R. 208.3(b). Withholding of removal is *mandatory* if an "alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion,"

8 U.S.C. § 1231(b)(3)(A), or if he would be tortured if removed, 8 C.F.R. § 208.16(b)(2). Any claim of authority to apply discretion, or time limits, to determinations under withholding of removal is a clear violation of law. As Doris Meissner, the then Commissioner of Immigration and Naturalization Service explained in the Federal Register, "Form I-589 is an application for both asylum and withholding of removal. *There is no 1-year time limit for filing for withholding of removal, so an application that is untimely as to asylum may nevertheless be adjudicated for withholding of removal.*" 63 FR 13875-02, (Mar. 23, 1998) (emphasis added). Thus, even assuming that the regulations do not permit successive untimely applications for asylum, the denial of the right to a hearing on a claim for asylum, withholding of removal, and Convention Against Torture claim violates U.S. law as well as obligations under the U.N. Protocol Relating to the Status of Refugees, the Convention Against Torture, and the Due Process rights of Respondent.

Congress passed the Refugee Act of 1980, P.L. 96-212, to implement the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees ("Protocol"), Jan. 31, 1967, 19 U.S.T. 6224, T.I.A.S. [sic] No. 6577 (1968), to which the United States acceded in 1968. *See Cardoza-Fonseca*, 480 U.S. at 438-439. The Protocol incorporates by reference Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951), *reprinted* in 19 U.S.T.,

at 6259, 6264-6276 ("Refugee Convention"). According to 8 U.S.C. § 1253(h)(1), which parallels Article 33 of the Refugee Convention, "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." *Id.* at 6276.

Similarly, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G. A. Res. 39/46, U.N., GAOR, 39 Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), ("Torture Convention" or "CAT") prohibits signatory governments from repatriating individuals to another state "where there are substantial grounds for believing that he would be in danger of being subjected to torture." Torture Convention, Article 3. The Foreign Affairs Reform and Restructuring Act of 1998, Pub.L. No. 105-277, § 2242, 1999 U.S.C.C.A.N. (112 Stat. 2681) ("FARR Act") implemented the Convention Against Torture in the U.S.

Notably, both the Torture Convention and the Protocol impose a clear and non-discretionary duty: the agencies responsible for carrying out expulsion, extradition, and other involuntary returns, *must* ensure that those subject to their actions may not be returned if they are likely to face persecution or torture. The government has repeatedly acknowledged that it would be unlawful to return an individual to a country where they would face persecution or torture:

> Withholding of removal is a mandatory form of relief that the Immigration Judge must grant if the applicant is found to have a clear probability of persecution in his or her country of origin . . . . , This form of protection fulfills United States' treaty obligations. . . . The 1967 Protocol require[s] contract states to ensure that no refugee be returned to a country where his or her life would be threatened due to one of the five protected grounds for refugee status.

U.S. Department of Justice, Executive Office for Immigration Review, *FY 2005, Statistical Year Book*, Feb. 2006, available at: http:/www.usdoj.gov/eoir/statspub/fy05syb.pdf#search=%22%22treaty%20obligations%22%20and%20%22withholding%20of%20removal%22%20and%20reinstatement%22 (last accessed 13 September, 2006).

Similarly, INS explained in the Federal Register:

> Wherever possible, subsequent acts of Congress must be construed as consistent with treaty obligations. See e.g., *Cook v. United States,* 288 U.S. 102, 120 (1933) ("[a] treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed."). Here, Congress has not indicated an intent to modify the obligations imposed by Article 3. In fact, Congress has clearly expressed its intent that any exclusion of aliens described in section 241(b)(3)(B) of the Act from the protection of these regulations must be consistent with

> Article 3. The obligation not to return such an alien to a country where he or she would be tortured remains in effect. Thus, while this rule does not extend the advantages associated with a grant of withholding of removal to aliens barred under section 241(b)(3)(B) of the Act, it does ensure that they are not returned to a country where they would be tortured.

Department of Justice, Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture,* FR. 9-99.

It is precisely for this reason that Congress created a procedure for ensuring that individuals previously deported but reentered had the opportunity to present their claims of fear of persecution. Under this provision, "[i]f the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, [and] the alien is not eligible and may not apply for any relief under this chapter, ..." INA § 241(a)(5), 8 U.S.C. § 1231(a)(5). However, even an alien subject to § 241(a)(5) may seek withholding of removal under 8 U.S.C. § 1231(b)(3)(A) or under 8 CFR §§ 241.8(e) and 208.31. In explaining the basis for this exception, INS stated that:

> Regulations published in February 1999 delegate authority to asylum officers to conduct reasonable fear screenings of certain aliens who are subject to INS reinstatement of a final order of deportation, exclusion, or removal or who are subject to INS removal under section 238(b) of the INA, based on an aggravated felony conviction. The INA precludes such aliens from applying for immigration benefits, but at the same time the United States must comply with treaty obligations not to return an alien to a country where he or she would be persecuted or tortured. Therefore, if such an alien seeks to apply for withholding of removal based on fear of persecution or torture, an asylum officer will conduct an interview to determine whether the alien has a reasonable fear of persecution or torture. If a reasonable fear is found, the alien is referred to an immigration judge to apply for withholding or deferral of removal to the country where persecution or torture is feared.

U.S. Department of Justice, Asylum *Reform, 5 Years Later*, (2000), available at: http://www.uscis.gov/graphics/services/asylum/asylum_brochure.pdf (last accessed September 13, 2006.

Notably, the provisions of the law providing for a reasonable fear interview do not make an exception for those removed as a result of a denial of asylum claim. Neither does the treaties that give rise to the U.S. obligations. Thus, if the U.S. is prohibited from returning an individual to a place where he or she

faces persecution or torture, then the U.S. cannot do it under any circumstance.

The fact that a procedure already exists for some classes of aliens to present their claims demonstrates that prohibiting another class in similar circumstances would violate basic cannons of due process and equal protection. The Supreme Court, in *Bridges v. Wixon*, 326 U.S. 135, 154 (1945), held that "[t]hough deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty – at times a most serious one – cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." Further, the Supreme Court has found that the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Eldridge*, 424 U.S. at 333. As the Board noted in *Matter of Pula* "the danger of persecution should generally outweigh all but the most egregious of adverse factors." 19 I & N Dec. 467, 474 (BIA 1987).

D. The Birth of U.S. Citizen Children Constitutes the Changed Circumstances Envisioned by the Statute and Regulation

The voluminous documentation presented demonstrates that Respondent faces sterilization and/or other persecution on account of China's one-child

family planning policy. At the outset, it is important to highlight how broad the definition of "changed circumstances" was intended by the statute and regulation. In explaining changes made to the governing regulations in 2000, the Department of Justice explained that:

> Many commenters recommended a change in the language of [8 C.F.R] § 208.4(a)(4) and § 208.4(a)(5) that would indicate the list of circumstances is not all-inclusive. That suggestion has been adopted.
>
> The Department agreed with several of the recommended amendments to [8 C.F.R.] § 208.4(a)(4), relating to changed circumstances. First, the Department eliminated the requirement that the changed circumstances be "objective." The modifier "objective" was removed to avoid confusion in cases where, for example, *the changed circumstance relates to a subjective choice an applicant has made, such as a religious conversion or adoption of political views.* Additionally, the Department eliminated the requirement that the changed circumstances occur within the United States, because there may be situations in which the changed circumstances, such as religious conversion, took place outside the United States, but not in the applicant's home country. The Department also specified that cessation of the requisite relationship between a principal applicant and a dependent after the dependent has been included in the

> principal applicant's application as a derivative applicant may constitute a changed circumstance. Finally, the Department clarified that an adjudicator must take into account an applicant's delayed awareness of a changed circumstance, such as events in the home country, when determining whether a period of delay is reasonable.

65 FR 76121-01 (Dec. 6, 2000) (emphasis added).

This language demonstrates that the statute and regulations were intended to be applied in an exceptionally broad manner. The fact that acts within an applicants control led to the fear of persecution, such as religious conversion, or in this case, starting a family, can still provide the basis for proceeding with a new claim for asylum, withholding of removal, and relief under the Convention Against Torture.

Here, the affidavit of John Aird, a "former specialist on demographic developments and population policy . . . in China" dated 19 May, 2003 establishes that Respondent's fear of future persecution is remarkably well founded. Mr. Aird documented evidence suggesting "Chinese couples returning home with unauthorized children cannot expect to be exempt [from the coercive one-child family planning policy.]" Mr. Aird concludes that "the concerns of Chinese couples over what awaits them if they are repatriated with children born abroad without official permission *are probably in most cases well-founded.*" (emphasis added). A translated Chinese-language newspaper provided to the Board documented the

experience of a Hong Kong citizen who was sought for a forced abortion during a visit for China due to China's one child family planning police [sic].

Recently discovered documents "suggest[] that forced sterilization is part of the official family-planning policy in Changle City, Fujian Province, China, and that this policy is applied to the repatriated parents of foreign-born children." *Tian Ming Lin v. U.S. Dept. of Justice, Tian Ming Lin v. U.S. Dept. of Justice*, 468 F.3d 167, 169 (2d. Cir 2006). In *Shou Yung Guo v. Gonzales,* 463 F.3d 109 (2d Cir. 2006), the Court remanded the case to the BIA for further consideration of the documents, as the Court concluded that the BIA had failed to sufficiently examine them. *Id.* at 113. The Court quoted from one document to highlight their importances:

> [N]o exception or waiver shall be applicable to Chinese nationals and citizens who engage in reproductive behavior overseas in violation of family-planning regulations as enforced in his or her area of residence of household registration in China. . . . Such Chinese nationals and citizens shall be subject to family-planning enforcement upon resettlement in China.

Id. (*quoting* Fujian Province Department of Family-Planning Administration).

In *Jin Xiu Chen v. U.S. Dep't of Justice*, 468 F.3d 109 (2d Cir. 2006), the Court took notice of the *Shou Yung Guo* documents despite the fact that they were

not part of the record. *Id*; *see also Tian Ming Lin v. U.S. Dept. of Justice*, 468 F.3d 167, 169 (2d. Cir 2006). These decisions demonstrate that *Wang v. Board of Immigration Appeals*, 437 F.3d 270 (2d Cir 2006) and *Matter of C-C-* are no longer applicable as a proposition that, as a matter of law, Chinese nationals with U.S. born children do not have a fear of persecution or changed circumstances.

As the above-cited evidence indicates, Respondent's fear of sterilization is well-founded. Consequently, he is entitled, at the very least, to have the opportunity to present his claim in a full and fair hearing.

While the statute does not define precisely what "to the satisfaction of the Attorney General" means, it cannot require a higher burden of proof then that needed to actually establish eligibility for asylum; and certainly not require an alien to "conclusively" prove that he will be persecuted. To establish a "well-founded fear" it must be shown that a reasonable person in the same circumstances would fear persecution if removed. *Mikhael v. INS*, 115 F.3d 299, 304 (5th Cir. 1997); *Matter of Mogharrabi*, 19 I &N Dec. 439 (BIA 1987). The Supreme Court stated that "[o]ne can certainly have a well wounded [sic] fear of an event happening when there is less than a 50% chance of the occasion taking place." *INS. v. Cardoza-Fonseca,* 480 U.S. 421, 431 (1987). In fact, the Court noted that even a 10% chance of suffering persecution would result in a fear being well-founded. *Id.* at 440.

The Third Circuit recently ruled that the Aird Affidavit, coupled with evidence of U.S.-born children was sufficient to establish "as a matter of law" that an applicant was entitled to a new asylum hearing as such evidence supported the "conclusion that [she] has shown a realistic chance of success on remand." *Guo v. Ashcroft*, 386 F.3d 556, 561 (3d Cir. 2004). Although Guo addressed the reopening standards, the factual issues and evidence presented are identical to the case at bar. There, the Board required conclusive proof of the existence of the family planning policy. *Id.* The Third Circuit reversed for, among other reasons, the grounds that the Board applied the wrong standard. *Id.*

E. The Government Has An Obligation To Consider The Overriding Interests Of Respondent Maintaining Family Unity Before Removing Them To Persecution

There is an overriding public interest and due process rights to family unity. The Supreme Court has expressly described deportation as a "harsh measure," *INS v. Cardoza-Fonseca*, 480 U.S. at 449, that "may result also in loss of . . . all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). As the Ninth Circuit explained, "it cannot be gainsaid that *the private liberty interests involved in deportation proceedings are among the most substantial.*" *Padilla-Agustin v. INS*, 21 F.3d 970, 974 (9th Cir. 1994) (emphasis added), *rev'd on other grounds as recognized by Pablo v. INS*, 72 F.3d 110, 113 (9th

Cir. 1995). This case raises the question of whether that "harsh measure" violates the substantive due process rights of separating Respondent from his children.

Freedom in matters of family life "is a fundamental liberty interest" protected by the Due Process Clause of the Fifth Amendment. *See, Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (finding that natural parents have a fundamental liberty interest in care, custody and management of their child); *see also Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("The integrity of the family unit has found protection in the Due Process Clause."). And the Supreme Court has recognized the continuing vitality of this liberty interest in this century too. *See Troxel v. Granville*, 530 U.S. 57, 66 (2000) ("it cannot now be doubted that the Due Process Clause . . . protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children"). This right of parents and children to live together, and for parents to raise their children, reflects a "strong tradition" founded upon "[t]he history and culture of Western civilization," which "is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). "Among the most important of the liberties accorded this special treatment is *the freedom of a parent and child to maintain, cultivate, and mold*

their ongoing relationship." *Franz v. United States*, 707 F.2d 582, 595 (D.C. Cir. 1983) (emphasis added).

Distilled, the case law establishes that a fundamental right exists for parents and children to maintain their bonds and ongoing relationship as a family unit free from government action that destroys that family unit. This constitutionally protected interest in the maintenance and development of familial bonds, free from government interference, manifests itself in the reciprocal rights of parents and children to one another's companionship. *See Stanley*, 405 U.S. at 651; *Franz*, 707 F.2d at 595.

The Immigration and Nationality Act recognizes this fundamental right and has been interpreted as having "family unity as one of the principal goals of the statutory and regulatory apparatus," *Fornalik v Perryman*, 223 F.3d 523, 525-526 (7th Cir. 2000), there is a strong basis of support for the notion that family members should be kept together during removal proceedings. *See, e.g., Fiallo v. Bell*, 430 U.S. 787, 811 (1977) ("[T]he legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended . . . to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united") (internal citation omitted); *Dallo v. INS*, 765 F.2d 581, 587, n. 7 (6th Cir. 1985) (family unification is "a goal which Congress has promoted through a number of provisions of the Act."); *Adams v. Howerton*, 673 F.2d 1036, 1042 (9th Cir. 1982) (Congress has "manifested its concern for

family integrity"); *Legal Assistance For Vietnamese Asylum Seekers v. Department of State, Bureau of Consular Affairs,* 45 F.3d 469, 472 (D.C. 1995) ("[I]n originally enacting the INA, Congress 'implement[ed] the underlying intention of our immigration laws regarding the preservation of the family unit.'") (quoting, H.R Rep. No. 1365, 82d Cong., 2d Sess. (1952), reprinted in 1952 U.S.C.C.A.N. 1653, 1680). Family unification has been most strongly evidenced in the Child Status Protection Act (CSPA), Pub. L. 107-208, 116 Stat. 927 (August 6, 2002), which prevents minor children from "aging out" of certain benefits, causing unnecessary family separation.

Here, it is respectfully asserted that the Immigration Court is required to review the substance of Respondent's claim for asylum before any order of removal is executed, in light of Respondent's right to protection and unity of the family.

IN THE ALTERNATIVE, IF THE COURT DENIES THE MOTION TO FILE SUCCESSIVE ASYLUM APPLICATION, RESPONDENT REQUEST THAT THE CASE BE REOPENED BASED ON CHANGED COUNTRY CONDITION PURSUANT TO INA § 240(c)(7)(C)(ii)

The United States Court of Appeal for the Second Circuit has decided recently in Guo v. Gonzales, 02-4275 (2006 U.S. App. Lexus 23169) that there is a change in family planning policy regulations in Changle, Fujian Province, clarifying that individuals with children born abroad will be subjected to the

same application of the coercive population control policy upon return as if they had never left China. The Court found that this constituted a change in circumstances occurring in the country of nationality and was therefore not subject to the time limitations of the regulations. (8 CFR 1003.2(c)(3)(ii)).

The documents referred by the Second Circuit, as filed here, were 2003 decisions from the Changle City Family Planning Administration and the Fujian Province Department of Family Planning Administration. These decisions dealt with the sanctions applicable to Chinese nationals who had given birth a child while living abroad. The first stated that "where either parent remains a Chinese national and citizen with no permanent residence overseas, any child of such a couple . . . is deemed a Chinese national and shall not be treated as [a] foreign national or citizen for domestic administrative purposes." The decision cautioned that Chinese nationals engaging in "any reproductive behavior in violation of family-planning enforcement in China" will be sanctioned according to family-planning rules and regulations enforced at the local level, subject to exceptions for those having a permanent residence overseas or a temporary visa for at least a three year stay. The Fujian Province Department of Family Planning Administration affirmed the Changle City opinion. Subject to the same exceptions noted above, the Fujian Province decision concluded:

> [N]o exception or waiver shall be applicable to Chinese nationals and citizens who engage

> in reproductive behavior overseas in violation of family-planning regulations as enforced in his or her area of residence of household registration in China. . . . Such Chinese nationals and citizens shall be subjected to family-planning enforcement upon resettlement in China.

In addition, in Lianjiang County, the Announcement of Further Improvement of the Family Planning Work by CPC Lianjiang County Guantou Township Committee clearly stated that:

> To those returning oversea Chinese, if they have child (children) born in China or abroad, the child (children), whether they have obtained citizenships of foreign countries or not, without exception, should be included in our town's family planning goal and should be managed according to current family planning management methods . . . one party of the couples shall be sterilized if the nature of the violation is very serious."

Nationally, the General Office of the National Population and Family Planning Commission of China and the Ministry of Public Security of the People's Republic of China also affirmed that according to the "Nationality Law of the People's Republic of China", any person born abroad whose parents are both Chinese nationals and unsettled abroad or one of whose parents is a Chinese national and unsettled abroad shall have Chinese nationality. In principle, foreign nationality of such person acquired at birth shall not be recognized and such person shall be administered

as Chinese citizen" and they shall be handled under Chinese law for family planning purpose.

IN ADDITION, RESPONDENT REQUEST REOPENING BASED ON THE COURT INHERENT *SUA SPONTE* AUTHORITY TO REOPEN CASES IN THE INTERESTS OF JUSTICE.

CONCLUSION

For the foregoing reasons, Respondent's within motions should be granted and a full and fair hearing on the merits of Respondent's applications for asylum, withholding of removal under the INA, and relief under Article III of the Convention Against Torture be held.

Dated: New York, New York
March 22, 2007

/s/ Theodore Cox
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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW BOARD OF IMMIGRATION APPEALS

April 9, 2007

In the Matter of:	
Ming Dong	**File No.: A74 762 766**
In exclusion proceedings	

CHARGE: I&N – Sections 212(a)(C)(A)(i) – fraud or willful misrepresentation; 212(a)(7)(A)(i)(I) and 212(a)(7)(B)(i)(I)

APPLICATION: Motion to Reopen before the Board of Immigration Appeals.

ON BEHALF OF APPLICANT:
Theodore N. Cox
401 Broadway, Suite 701
New York, NY 10013

ON BEHALF OF SERVICE:
Mirta J. Woodall
55 E. Monroe, Ste. 1700
Chicago, Illinois 60603

DEPARTMENT REPLY BRIEF OPPOSING RESPONDENT'S MOTION TO REOPEN

STATEMENT OF THE FACTS

The applicant is a 26-year-old male, native and citizen of the People's Republic of China ("China") who arrived in the United States in 1996. The applicant was subsequently placed into exclusion proceedings after filing an I-122, where the Immigration

Judge sustained the allegations and charges of excludability contained in the charging document, Form I-122. At a continued hearing, the applicant presented his claim for relief from exclusion and deportation. After a hearing on the merits of applicant's applications for relief, the Immigration Judge denied his requests for political asylum and withholding of exclusion and further ordered the applicant be removed to China on the charge contained in the I-122. Respondent then filed an appeal of this decision. The Board of Immigration Appeals ("Board") on December 17, 2002 affirmed the Immigration Judge's decision.

STATEMENT OF THE CASE

The Department of Homeland Security ("Department") respectfully requests that the Board of Immigration Appeals deny respondent's motion to reopen.

ARGUMENT

Respondent through his attorney now seeks to reopen Mr. Dong's case based upon a Byzantine reading of the relevant regulatory provisions in an attempt to fit respondent under the incorrect regulatory scheme. Respondent is not eligible under applicable law to a reopening of his case despite his attempt at utilizing provisions which are not available to him at this stage of proceedings. The relevant regulation in this case is 8 C.F.R. § 1003(c)(3)(ii) which requires a showing of changed circumstances

arising in the alien's country of origin. Respondent claims changed circumstances based on his own personal circumstances, not on changed circumstances arising in the country of origin. Therefore, his motion should be denied.

1. Respondent must file a motion to reopen based on the regulations found in 8 CFR 1003, not 8 CFR § 208

In respondent's creative brief, he appears to argue that he does not need a motion to reopen in order to have his asylum application adjudicated by the Immigration Judge. In order to make his case respondent's attorney relies on 8 C.F.R. § 208. However, this provision refers to individuals who are presenting an *initial* asylum application at the end of proceedings and not those who have already attempted to get this remedy in prior proceedings. Furthermore this regulation does not cover the requirements for such an application. The text of the regulation reads:

> 4) *With the Board of Immigration Appeals.* In conjunction with a motion to remand or reopen pursuant to §§3.2 and 3.8 of this chapter where applicable, ***an initial*** asylum application shall be filed with the Board of Immigration Appeals if jurisdiction over the proceedings is vested in the Board of Immigration Appeals under 8 CFR part 3. ***Any such motion must reasonably explain the failure to request asylum prior to the***

completion of the proceedings. 8 CFR § 208.4(b)(4) (*emphasis added*)

Respondent makes much ado about the phrase *where applicable* in this regulation. Despite respondent's attempt to obfuscate a reading of this regulation, there is no indication in this language that it be read to expound on the requirements extant in the statute. It merely states in straightforward language what the procedure is for claimants who want to file an initial asylum application at the end of proceedings.

These regulations also do not address the requirements of these motions to re-open at the Board of Immigration Appeals level. These requirements are found in the appropriate section of the regulations. Whether respondent seeks a new application or renewed one, the same requirements apply. In this case, clearly, respondent must use the rules stated in 8 CFR § 1003 which relate to motions to re-open before the Board of Immigration Appeals.

Respondent, through his attorney, then goes at length in his discussion of the Respondent's eligibility under 8 CFR § 208. This attempt to conflate regulatory provisions related to asylum applications under the jurisdiction of the Department of Homeland Security and those under the jurisdiction of the Executive Office for Immigration Review border on the frivolous and serve nothing to elucidate respondent's claim.

The regulations for motions to re-open based on changed circumstances in respondent's case are abundantly clear. They are as follows:

> (ii) To apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing. 8 CFR § 1003.2(c)(3)(ii)

Clearly, the respondent does not wish to fall under the requirements set out in this regulatory provision and thus his attempt at going around it by discussing inapplicable law. Respondent's claim is based on the birth of his two children while being, (in contravention of the law), in the United States. These are not conditions arising out of the country but relate only to respondent's personal circumstances. For this reason, respondent is attempting to evade the appropriate regulatory scheme.

Motions like the present one are ample evidence to show why the regulatory scheme in this section is stricter than the one contained in the Department of Homeland Security Section. Once respondent has ample opportunity to prove his case without success, access to the Board through the use of motions to reopen should be limited to non-frivolous cases that pertain to the conditions of the country where persecution is being claimed in a meaningful way. Otherwise, respondent would have an unlimited number of

bites at the apple, even in circumstances where they have already been found ineligible under similar claims.

2. Respondent's claim of changed circumstances do not apply to him.

The only colorable claim that respondent makes relies on changed circumstances as discussed by the Second Circuit in *Guo v. Gonzales*; 463 F.3d 109 (2nd Cir. 2006). Respondent cites a plethora of other similar Second Circuit cases to make his claim. Most of these are cases based on the specific circumstances of claimants in that jurisdiction. However, respondent's claim falls under the jurisdiction of the Board of Immigration Appeals and the Seventh Circuit, not the Second Circuit.

The Board recently held in *In re C-C*, 23 I&N Dec. 889 (BIA 2006) that claims based on the birth of a second child in the United States are insufficient to show changed circumstances. In addition, the Seventh Circuit has limited the value of general evidence regarding China's one-child policies. *Lin v. Gonzales*, 435 F.3d 708 (7th Cir. 2006). The Seventh Circuit has also cited *In re C-C* in an unpublished decision which echoes the holding that having more children in the United States is a change in personal circumstances and not a change arising out of the country of origin. *See Yang v. Gonzales*, 2007 WL 529063 (7th Cir. 2007).

In this case, respondent only uses general country condition information found in the Second Circuit cases in order to support his claim. This is not enough under Seventh Circuit law. Further, a change in his personal circumstances, namely, his having children in the United States, does not fulfill the requirement of the regulation pertaining to motions to reopen before the Board.

Therefore the Service respectfully requests that this honorable Board deny the respondent's frivolous motion.

CONCLUSION

For the reasons stated, the Service requests that the motion to reopen be denied.

Respectfully submitted,

KAREN LUNDGREN
CHIEF COUNSEL

/s/ Mirta J. Woodall
BY: Mirta J. Woodall
Assistant Chief Counsel

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE

CERTIFICATE OF SERVICE

Alien's Name: Ming Dong

Alien's Number: A74-762-766

On April 9, 2007, I, Mirta J. Woodall, sent via first class mail a complete copy of the Government's brief to the respondent's representative of record at the following address:

Theodore N. Cox
401 Broadway, Suite 701
New York, NY 10013

/s/ Mirta J. Woodall
Mirta J. Woodall
Assistant Chief Counsel
Department. of Homeland Security
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Date: April 9, 2007

In the

United States Court of Appeals

for the Seventh Circuit

No. 06-3189

CHENG CHEN,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney General of the United States,

Respondent.

Petition for Review of an Order of the Board of Immigration Appeals.
No. A 70 907 793

ARGUED APRIL 18, 2007 – DECIDED AUGUST 23, 2007

Before POSNER, COFFEY, and FLAUM, *Circuit Judges*.

POSNER, *Circuit Judge*. The question presented by this petition to review a decision of the Board of Immigration Appeals is whether an alien may file an application for asylum, on the basis of a change in his personal circumstances, after he has been ordered removed (deported) and after the 90-day deadline for

filing a motion to reopen a removal proceeding has expired. The Board ruled that he cannot.

In 2001 the petitioner, a Chinese citizen, was ordered deported to China. He did not seek judicial review of the order, but neither did he leave the United States. Instead he married an American and fathered two children by her. In 2006 he filed a motion to be permitted to seek asylum on the basis that if returned to China he might be forcibly sterilized for violating China's one-child policy. The denial of that motion is the order he asks us to vacate. A previous application for asylum, based on different grounds, had been rejected in the course of his original removal proceeding.

An alien may not seek asylum who has been in the United States for more than a year or has filed a previous application for asylum that has been denied, 8 U.S.C. §§ 1158(a)(2)(B), (C), but there is an exception if he can "demonstrate[ ] to the satisfaction of the Attorney General . . . the existence of changed circumstances which materially affect the applicant's eligibility for asylum." § 1158(a)(2)(D). Another statutory provision, however, requires that a motion to reopen a removal proceeding be filed within 90 days after the final order of removal, § 1229a(c)(7)(C)(i), unless the basis for the motion is "changed country conditions *arising in the country of nationality* or in the country to which removal has been ordered." § 1229a(c)(7)(C)(ii) (emphasis added). If this provision governs the present case, the petitioner is out of luck because the changed country conditions that he

alleges are not changed conditions in China but changed conditions resulting from his fathering two children in the United States. That is the conduct that he claims exposes him to a risk of involuntary sterilization should he be returned to China.

We agree with the Board of Immigration Appeals that this provision (section 1229a(c)(7)(C)(ii)) governs, and so the petition for review must be denied. There is no conflict with section 1158(a)(2)(D), the section that allows a belated application for asylum on the basis of changed circumstances. That section says nothing about the situation in which the applicant has already been ordered removed, the order has become final, and the time for reopening the removal proceeding has expired. The distinction that section 1229a(c)(7)(C)(ii), allowing reopening after that time has expired, makes between changed *country* conditions and changed *personal* conditions is sensible, since the alien can manipulate the latter but not the former, as the petitioner in this case did. It makes no sense to allow an alien who manages to elude capture by the immigration authorities for years after he has been ordered to leave the country, and has exhausted all his legal remedies against removal, to use this interval of unauthorized presence in the United States to manufacture a case for asylum. *Wang v. BIA*, 437 F.3d 270, 274 (2d Cir. 2006).

The government reminds us that the Board of Immigration Appeals' interpretation of the statutes that it enforces is entitled to deference. E.g., *Chevron v. Natural Resources Defense Council*, 467 U.S. 837,

842-44 (1984); *Ali v. Achim,* 468 F.3d 462, 468 (7th Cir. 2006); *Heaven v. Gonzales,* 473 F.3d 167, 171 (5th Cir. 2006); *Cuadra v. Gonzales,* 417 F.3d 947, 950 (8th Cir. 2005). The petitioner, however, points to a published comment by the Justice Department's Executive Office for Immigration Review, which is composed of the immigration judges and the members of the Board of Immigration Appeals, see www.usdoj.gov/eoir/background.htm (visited Apr. 23, 2007), that supports his position. 62 Fed. Reg. 10312, 10316 (Mar. 6, 1997). We think the Board's decision, a formal adjudication subsequent to the EOIR's comment (the legal status of which is unclear), deserves precedence. But if not – if in view of the disagreement between these two bodies we should give deference to neither and instead make our own interpretation – we reach the same conclusion as the Board.

There is, it is true, a tension between this conclusion and language in a recent decision by the Sixth Circuit, *Haddad v. Gonzales,* 437 F.3d 515, 517-18 (6th Cir. 2006), echoing a dictum by the Second Circuit in *Guan v. BIA,* 345 F.3d 47, 49 (2d Cir. 2003) (per curiam), inviting an alien to attempt what the petitioner did in this case. *Haddad* describes it as an "odd" result and neither case gives any reason for the result other than that section 1158(a)(2)(D), the section that authorizes an application for asylum on the basis of changed conditions either country or personal, does not contain a deadline for filing such an application. The language in *Haddad,* as in *Guan,* is dictum; the court in *Haddad* upheld the Board's

denial of the specific relief sought by the petitioner and merely speculated that she might have an alternative route to relief. The court did not mention section 1229a(c)(7)(C) or the Board's understanding of its relation to section 1158(a)(2)(D) – and added in a footnote that the alternative route might be time barred. 437 F.3d at 518 n. 7. Indeed – and so the tension is dissolved.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit